IN THE COURT OF APPEALS
STATE OF NEW MEXICO

ROBERT CIOLLI
and MARY LOU CIOLLI

Appellees/Appellee

vs.

Docket No.32,241

McFARLAND LAND & CATTLE CO. INC.

Appellant/Appellant

APPELLANT'S BRIEF IN CHIEF

Appeal taken from County of Quay, Tenth Judicial District Court. Honorable Albert J. Mitchell, Jr., District Judge.

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RECORDED TRANSCRIPT

The recorded transcript was taken by For The Record equipment and softwear. References to the recorded transcript are by clock time.

STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally space type style or type face, Times New Roman, and the body of the brief contains 3,267 words as indicated by WordPerfect, version X5.

(1) STATEMENT OF THE NATURE OF THE CASE

This was a matter brought below for Declaration of an Easement in favor of Appellees upon the lands of Appellant.

(2) COURSE OF PROCEEDINGS

Appellee filed his complaint for Declaration of an Easement against Appellant on August 26, 2011 seeking an easement by prescription or alternatively upon an implied easement (RP 1). Appellant filed its Answer on October 12, 2011 generally denying the allegations of the Complaint and raised defenses, *inter alia*, of permissive use and res judicata based upon a prior Quiet Title action against Appellees' predecessors in title (RP 26). The matter proceeded to trial on January 30, 2012. (RP 44-65). The parties filed their respective requested Findings of Fact and Conclusions of Law (RP 73 and 94). The Court entered its Findings of Fact and Conclusions of Law on March 12, 2012 (RP 101) and entered its Judgment granting the easement on May 10, 2012 (RP 114). Appellant filed its Notice of Appeal on May 31, 2012 (RP 122)

(3) SUMMARY OF FACTS RELEVANT TO THE APPEAL

Appellees and Appellant own adjoining parcels of ranch land in Quay County, State of New Mexico. Appellees' property is described as follows:

TOWNSHIP EIGHT (8) NORTH, RANGE THIRTY-TWO (32) EAST, N.M.P.M.
Section 3: SW/4NW/4 (Lot 9), W/2sw/4, and Lots 6, 7, 10, and 11
Section 4: SE/4 and SE/4NE/4 (Lot 9)
(hereinafter "Ciolli Ranch")

The property owned by Appellant at issue in this litigation is described as follows:

TOWNSHIP EIGHT (8) NORHT, RANGE THIRTY-TWO (32) EAST, N.M.P.M. Section 9: E/2

(RP 1 and RP 26)

This particular parcel is part of a much larger ranch owned by Appellant which consists of several thousand acres but for purposes of this appeal the parcel in question will be referred to as "McFarland Ranch". Appellant purchased the property identified as McFarland Ranch in 1970 from Benton Hodges ("Hodges"). The deed from Hodges to McFarland did not reserve any easement or other right of access across the property deeded to McFarland.(Exhibit 01-30-12-A) Hodges also owned the property known as "Ciolli Ranch" at the time of sale to McFarland Ranch (Tr. 1:42:39PM). At the time of sale from Hodges to McFarland, Hodges accessed the property designated as Ciolli Ranch from the North and East from NM State Highway 284 (Latham Route) and not across the property conveyed to McFarland (Tr. 1:44:30PM, Tr. 1:45.45, Tr. 1:48:50, Tr. 1:50:45, Exhibit 01-30-12-B). Although it was commonly accepted and permitted practice among the

adjoining ranch owners in this area to come on to or cross adjoining ranches as necessary for ranching purposes (Tr. 11:22:45, Tr. 1:53:20PM). McFarland Ranches had a "feed road" running north and south along its eastern boundary from which livestock could be fed, moved or transported. This feed road continued onto the Ciolli Ranch as McFarland would lease the grass for cattle grazing on the Ciolli Ranch from Hodges prior to the purchase by Ciolli and used this route to care and feed cattle (Tr. 1:50:02PM).

Hodges died in 1975 and no evidence was presented as to adverse use of or access across McFarland Ranch to the Ciolli Ranch from 1975 to 1997. In 1980, Appellant McFarland Ranch bought a Quiet Title action regarding the parcel of land Appellant had purchased from Hodges in Quay County in CV80-00028 in the Tenth Judicial District Court and by Final Decree dated May 15, 1980, title to McFarland Ranch was quieted against all named and all unknown claimants, including Hodges heirs (Ex. 01-30-12 B, Court's Findings No. 2, RP 101).

[POINT TWO AS RAISED BY THE COURT]

In 1997, Appellees entered into a real estate contract to purchase what is now "Ciolli Ranch" from an heir of Hodges (Tr. 10:36:40AM). Appellees resided in the State of Washington at the time of purchase and moved to Quay County in 2002 (Tr. 10:36:37AM). Appellees visited Ciolli Ranch by means of a hand drawn

map which directed access across the feed road on McFarland Ranch (Tr. 10:16:50, Ex. 01-30-12-2). Appellees visited the Ciolli Ranch once a year in 1997, 1998, 1999 and 2000. They did not visit the Ciolli Ranch in 2001(Tr. 10:38:02AM). McFarland Ranch was unaware of the Appellees' use of the feed road at the time (Tr. 2:17:00 PM, Tr. 11:01:05AM).

In 2002 or 2003, Appellees desired to sell the Ciolli Ranch and learned that they did not have a recorded easement to gain access to their property across any of the adjoining ranches including McFarland Ranch (Tr. 10:39:10 AM, 10:41:50AM). Appellees, as well as their real estate broker, visited the Appellant to request a written easement across McFarland Ranch (Tr. 11:01:10).

Appellant declined to give a written easement but gave Appellees permissive use of the feed road to access the Ciolli Ranch (Tr. 11:21:01-23:06AM, Tr. 1:35:18 PM, Tr. 1:55:34 PM, Tr. 2:13:10 PM). At the time there were alternative routes of access from public roadways to Ciolli Ranch (10:57:10), including the Latham route, which was the shortest and most direct although none of these access routes was recorded (Tr. 1:56:13PM).

At some time in 2011 Appellees attempted to sell the property at issue and again requested a written grant of easement from Appellant which Appellee declined to do although verbal permission was again given to Appellee to use the

feed road access. (Tr. 2:13:05 PM). This litigation followed.

On October August 26, 2011, Appellees filed their Complaint seeking a declaration of a prescriptive easement by adverse possession or a private implied easement (RP 1). Appellees alleged that an actual dispute existed justifying declaratory relief in that Appellants disputed the existence of an easement. Appellant admitted that a dispute existed over the existence of an easement as claimed by Appellees, and further, Appellants filed its Answer denying that any easement existed and stated that title to McFarland Ranch had been quieted by Judgment and that the Appellees' usage of the feed road on McFarland Ranch had been permissive at all times (RP 26). After trial on the merits on January 30, 2012, Appellant submitted requested findings of fact.(RP 94). These requests included findings that no evidence was presented as to adverse use of or access across McFarland Ranch to the Ciolli Ranch from 1975 to 1997. (Request No.8) Further that there was no evidence that there was any adverse non-permissive use of Appellant McFarland's feed road by any person from 1997 to 2002. (Request No. 16). And further that in 2002 0r 2003 Appellant gave Appellee permission to use the feed road to access the Ciolli Ranch. (Request No. 18). Appellant also requested a finding that Appellant has never admitted nor agreed that Appellees had a "right of access" across its property. (Request No. 23). The Court did not

make specific findings in accord with these requests. **CHALLENGED POINT ONE**

The Court entered its Findings of Fact and Conclusions of Law on March 12, 2012. (RP 101). In it Findings the Court found:

> 1. There is clear and convincing evidence that the Appellees right to cross the Appellant's property has never been in dispute. **CHALLENGED POINT ONE.**
> 2. Appellant filed a quiet title suit in Cause No. D-101O-CV-1980-00028. This quieted title to the Appellant's land as against the Appellees predecessors in title.
> 3. Throughout the quiet title action, and continuing through the present, at no time did McFarland Land and Cattle Co. deny the Appellees nor the Appellees predecessor's access to their property. The statements of Mr. McFarland, (also known as Shine McFarland) are valid statements, binding upon the corporation, as they were made in his role as president of the corporation. The corporation was present during trial, and testified through its current president, Kelly McFarland. **CHALLENGED POINT ONE**
> 4. At all times, the position of McFarland Land and Cattle has been that the Appellees, and their predecessors in title, have the right to cross Appellant's land to access Appellees property. **CHALLENGED POINT ONE**

Based upon these Findings the Court concluded as a matter of law:

> 1. This is not a lawsuit regarding whether or not an easement exists. No testimony was given that indicates Appellees could not cross the land of McFarland Land and Cattle, or that McFarland Land and Cattle would stop the Appellant from crossing their land. The dispute in this matter focused only upon whether or not the easement could be reduced to writing, and how the terms of the easement would be defined.
> **CHALLENGED POINT ONE**

4. ARGUMENT

Point One. Did the Trial Court error in granting Appellees an easement based upon a conclusion that an unwritten easement existed.

Standard of Review

The standard of review to be applied to a lower court's legal conclusions is de novo. *State v. Granillo-Macias*, 2008-NMCA-021, ¶ 7, 143 N.M. 455, 176 P.3d 1187

Discussion

While it is clear that the district court ordered that an easement in favor of Appellee existed and that a written easement should be entered in favor of Appellee, it is less then clear as to how the court arrived at that conclusion of law since elements of either an express easement or of an easement by prescription were not supported by the factual findings of the district court. The district court's reference to "right to cross" must be interpreted as discussed below as the existence of an easement.

"An easement is distinguished from a fee, and constitutes a liberty, privilege, right, or advantage which one has in the land of another." *Kennedy* v. *Bond*, 80 N.M. 734, 736, 460 P.2d 809, 811 (1969). "An easement creates a nonpossessory right to enter and use land in the possession of another . . ." *City of Rio Rancho v. AMREP Southwest, Inc.* 2011-NMSC-037 ¶ 33, and" . . may be

created by express agreement, prescription or by implication", *Herrera v. Roman Catholic Church,* 112 N.M. 717, 720, 819 P.2d 264, 267 (Ct. App.1991).

Express Agreement

Appellant agrees with the district court that an easement must be in writing as it found in its Conclusions (RP 102). This conclusion is in accord with other case law *See City of Rio Rancho v. AMREP SW, Inc.* 2011-NMSC-037 ¶ 37, (An easement described in a recorded instrument must be in writing. . . ."), See also, *Ritter-Walker Co. v. Bell*, 46 N.M. 125, 126, 123 P.2d 381, 382 (1942),"[t]itle to an easement passes like title to any other real estate and the statute of frauds requires that a grant of an easement be in writing unless acquired by adverse user." *See also*, *Beaver v. Brumlow*, 2010-NMCA-033, ¶16, in general discussing the English Statute of Fraud wherein "No action shall be brought upon any contract or sale of lands,. . . or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

In the present appeal, the district court did not find that there was any grant of easement by Appellant in writing nor did Appellee ever make such a contention. Specifically, the conclusion of the district court recognizes the absence

of any written grant of easement (RP 101, Concl. No 1). Accordingly, the apparent recognition by the court of an unwritten express easement which should now be recognized is in error as a matter of law.

Easement by Prescription

For an easement by prescription to be created the Appellee needed to show "an adverse use of land, that is open or notorious, and continued without effective interruption for the prescriptive period" *Algermissen v. Sutin*, 2003-NMSC-001 ¶10. In the present case the district court did not make any finding that the use of the feed road was "adverse", but rather the district court specifically found that no time did Appellants deny the Appellees access to their property (Rp 101). The permissive use of the feed road was acknowledged by Appellee (Tr. 11:23:06).

> We must determine whether there was sufficient evidence to support the finding that Defendants gave permission to Plaintiffs to cross their land. As stated earlier, the fact finder should presume adversity if all of the other elements of the claim are satisfied, and there is no evidence of express permission. . . . . It is important to recognize what this does not mean. This does not mean that a landowner must demonstrate that he or she gave express permission in order to defeat a prescriptive easement claim. Our cases demonstrate that implied permission is also permission sufficient to rebut the presumption. In Hester, we said that "if a use has its inception in permission, express or implied, it is stamped with such permissive character and will continue as such until a distinct and positive assertion of a right hostile to

the owner is brought home to him by words or acts.(citations omitted)

Algermissen v. Sutin, 2003-NMSC-001 {12}

The district court's findings of permissive use by Appellee is supported by the testimony as outlined above and would defeat any claim of right based upon prescription.

Point Two. Does a Quiet Title Judgment extinguish an easement by implication or necessity.

Standard of Review

"Statutory interpretation is a question of law, which we review de novo." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10.

Discussion

In the district court's findings the court found that the Quiet title action "quieted title to the Appellant's land as against the Appellees predecessors in title." (RP 101, Finding No. 2). The district court, consequently, did not find nor conclude that an easement by implication or necessity existed. Appellees did not appeal from this finding or conclusion. Rather, the Court of Appeals has requested that the parties address this issue due to its potential applicability to a "right for any reason" analysis by the Court.

Right for Any Reason

In the first Notice of Proposed Summary Disposition, filed August 21, 2012, this Court proposed summary affirmance, not on the findings or conclusions of the district court, but rather upon the doctrine of "right for any reason." This doctrine would allow the appellate court to "affirm a district court ruling on a ground not relied upon by the district court, [but] will not do so if reliance on the new ground would be unfair to appellant.. . . . This Court, however, on appeal . . . will not assume the role of the trial court and delve into . . . fact-dependant inquiries." *Meiboom v. Watson*, 2000-NMSC-0044, {20}. Appellee submits that to use this doctrine in this case would be unfair as the district court made no specific findings of fact which would support the application of easement by implication or necessity and its application would give the Appellee an appeal on an issue they did not appeal. It would further involve this court in "fact-dependant inquiries" as factual issues would need to be resolved before the application of the easement question would be decided.

Quiet Title Actions

A " quiet title" action is based upon §§42-6-1 *et. seq.* NMSA, 1978, as amended. The action is brought in the district court for the establishment of the petitioner's estate against any adverse claims to bar and forever estop any person, who has or may have any right or title to the premises adverse to the petitioner,

such that petitioner's title thereto "be forever quieted and set at rest." §§42-6-2 NMSA, 1978. The inquiry as to scope of interests or rights barred by a quiet title judgment involves an interpretation of the statute. When interpreting a statute,the court's goal is "to ascertain and give effect to the intent of the Legislature.. . . .To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10.

It is clear in New Mexico, as well as other jurisdiction, that the scope of a quiet title is broadly interpreted and applied. "It is used to determine any interest in land whether plaintiff is in or out of possession. *Currier v. Gonzales*, 78 N.M. 541, 434 P.2d 66 (1967); *Quintana v. Vigil,* 46 N.M. 200, 125 P.2d 711 (1942); see *Corman v. Cree*, 100 F.2d 486 (1938)." *Pacheco v. Martinez*, 97 N.M. 37, 41-42, (Ct. App. 1981).

"The primary purpose of . . . [the quiet title action] is to enable a party who is in the peaceable possession of land, and who, for this reason, cannot maintain an action at law, to compel a party who claims a right, title, or interest in the land, or who is ever reputed to so claim, to come into a court of equity and propound and show the nature, character, and kind of his title, claim, and demand, and to have it determined, and to have the court to decree and adjudge whether it is good or

bad." *Wylie v. Lewis*, 83 So.2d 346, 347 (1955).(Alabama)

Easement by Necessity/Implication

Easements by necessity arise from an implied grant or reservation of right of ingress and egress to landlocked parcel. *See Hurlocker v. Medina*, 118 N.M. 30, 31, (Ct. App. 1994). To establish such an easement it must be established that there existed "(1) unity of title, indicating that the dominant and servient estates were owned as a single unit prior to the separation of such tracts; (2) that the dominant estate has been severed from the servient tract, thereby curtailing access of the owner of the dominant estate to and from a public roadway; and (3) that a reasonable necessity existed for such right of way at the time the dominant parcel was severed from the servient tract. " *Id.* {31},{32}

The easement by definition is of an interest or "right" in land, and while no reported decision has been located which directly addresses the application of quiet title to bar such an interest, the clear goal of the statutory quiet title action is to clear the title of real property against any asserted or potentially asserted right effecting the landowner's interest in their property. While not directly on point, the *Hurlocker v. Medina* case, supra, allowed an easement by necessity claim to proceed in a quiet title action which arguably would support the res judicata effect of a quiet title action over even such a claim interest in land.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Chief was mailed and/or hand delivered to the following parties and counsel this 29th day of November, 2012:

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